

EDDIE R. JIMENEZ (CA SBN 231239)
HIEU T. PHAM (CA SBN 265146)
PITE DUNCAN, LLP
4375 Jutland Drive, Suite 200
P.O. Box 17933
San Diego, CA 92177-0933
Telephone: (858) 750-7600
Facsimile: (619) 590-1385

Attorneys for JPMORGAN CHASE BANK, NATIONAL ASSOCIATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA - FRESNO DIVISION

In re

JAMES GIBBS,

Debtor(s).

Case No. 10-64039-A

Chapter 7

D.C. No. PD-1

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

JPMORGAN CHASE BANK, NATIONAL
ASSOCIATION,

Movant,

vs.

JAMES GIBBS, Debtor(s); SHERYL ANN
STRAIN, Chapter 7 Trustee,

Respondents.

LBR 4001-1 and 9014-1(f)(1)

DATE: February 15, 2011
TIME: 1:30 p.m.
CTRM: 11

2500 Tulare Street,
Fresno, CA 93721-1318

JPMorgan Chase Bank, National Association¹ ("Movant"), moves this court for an order terminating the automatic stay of 11 U.S.C. § 362 as to Movant, so that Movant may commence and

¹ This Motion for Relief from Automatic Stay shall not constitute a waiver of the within party's right to receive service pursuant to Fed. R. Civ. P. 4, made applicable to this proceeding by Fed. R. Bankr. P. 7004, notwithstanding Pite Duncan, LLP's participation in this proceeding. Moreover, the within party does not authorize Pite Duncan, LLP, either expressly or impliedly through Pite Duncan, LLP's participation in this proceeding, to act as its agent for purposes of service under Fed. R. Bankr. P. 7004.

1 continue all acts necessary to enforce its security interest in real property generally described as
2 31900 Success Valley Drive, Porterville, California 93257-9644.

3 On or about December 3, 2010, James Gibbs ("Debtor") filed a voluntary petition under
4 Chapter 7 of the Bankruptcy Code, and Sheryl Ann Strain was appointed as Chapter 7 Trustee. As a
5 result of said filing, certain acts and proceedings against Debtor and the bankruptcy estate are stayed
6 as provided in 11 U.S.C. § 362.

7 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and 362(d)(2).

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I.**

10 **MOVANT IS ENTITLED TO RELIEF FROM THE**
11 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**

12 **NO EQUITY**

13 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the
14 debtor does not have any equity in the property and the property is not necessary to the debtor's
effective reorganization.

15 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:
16 § 362(d)(2) reflects congressional intent to allow creditors to
17 immediately proceed against the property where the debtor has no
18 equity and it is unnecessary to the reorganization, even where the
debtor can provide adequate protection under § 362(d)(1). (Emphasis
added).

19 Id. at 610 (emphasis added).

20 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court stated
21 that in determining whether equity exists in the property for purposes of § 362(d)(2), all
22 encumbrances are totaled, whether or not all the lienholders have joined in the request for relief from
23 stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194 (9th Cir.
24 1984).

25 An appropriate cost of sale factor should also be added to determine if the debtor has any
26 equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R. 283, 289
27 (Bankr. S.D. Cal. 1982).

28 /././

1 On or about January 13, 2005, Debtor, for valuable consideration, made, executed and
2 delivered to the original beneficiary Washington Mutual Bank, FA (hereinafter "WAMU") a Note in
3 the principal sum of \$300,000.00 (the "Note"). Pursuant to the Note, Debtor is obligated to make
4 monthly principal and interest payments commencing March 1, 2005, and continuing until February
5 1, 2035, when all outstanding amounts are due and payable. The Note provides that, in the event of
6 default, the holder of the Note has the option of declaring all unpaid sums immediately due and
7 payable. A copy of the Note is attached to the concurrently served and filed Exhibits to the
8 Declaration in Support of Motion for Relief From Automatic Stay ("Exhibits") as exhibit A and
9 incorporated herein by reference.

10 On or about January 13, 2005, the Debtor made, executed and delivered to WAMU a Deed of
11 Trust (the "Deed of Trust") granting WAMU a security interest in real property commonly described
12 as 31900 Success Valley Drive, Porterville, California 93257-9644 (the "Real Property"), which is
13 more fully described in the Deed of Trust. The Deed of Trust provides that attorneys' fees and costs
14 incurred as a result of the Debtor's bankruptcy case may be included in the outstanding balance
15 under the Note. The Deed of Trust was recorded on January 20, 2005, in the Official Records of
16 Tulare County, State of California. A copy of the Deed of Trust is attached to the Exhibits as
17 exhibit B and incorporated herein by reference.

18 On or about September 25, 2008, WAMU was closed by the Office of Thrift Supervision and
19 the FDIC was named receiver. As authorized by Section 11(d)(2)(G)(i)(II) of the Federal Deposit
20 Insurance Act, 12 U.S.C. Section 1821(d)(G)(i)(II), the FDIC, as receiver of WAMU, may transfer
21 any asset or liability of WAMU without any approval, assignment, or consent with respect to such
22 transfer. Pursuant to the terms and conditions of a Purchase and Assumption Agreement between
23 the FDIC as receiver of WAMU and Movant dated September 25, 2008, Movant acquired certain of
24 the assets, including all loans and all loan commitments of WAMU. As a result, on September 25,
25 2008, Movant became the holder of the loans and loan commitments of WAMU.

26 The obligation under the Note is in default as of June 1, 2010, for failure to make payments
27 to Movant. As of December 11, 2010, the total obligation due and owing under the Note is in the
28 approximate amount of \$290,469.24, representing the principal balance in the amount of

1 \$274,773.32, interest in the sum of \$5,025.28, late charges in the amount of \$777.15, escrow
2 advances in the amount of \$8,904.41, recoverable balance in the amount of \$967.38, and other fees
3 in the amount of \$21.70. This is an approximate amount for purposes of this Motion only, and
4 should not be relied upon as such to pay off the subject loan as interest and additional advances may
5 come due subsequent to the filing of the Motion. An exact payoff amount can be obtained by
6 contacting Movant's counsel. Further, Movant has incurred additional post-petition attorneys' fees
7 and costs in bringing the instant Motion. Moreover, the total arrears under the Note are in the
8 approximate sum of \$21,792.05, excluding the post-petition attorneys' fees and costs incurred in
9 filing the instant Motion.

10 II.

11 RELIEF FROM STAY

12 LACK OF EQUITY

13 Movant is informed and believes that, based on the Debtor's bankruptcy Schedules and
14 Statements, the fair market value of the Property is approximately \$343,000.00. Copies of the
15 Debtor's bankruptcy Schedules "A" and "D" are collectively attached to the Exhibits as exhibit C
16 and incorporated herein by reference.

17 Based on the above, Movant maintains that the equity in the Property is as follows:

18 Fair Market Value:	\$343,000.00
19 Less:	
20 Movant's Trust Deed	\$290,469.24
21 Chase's Second Trust	\$100,000.00
22 Deed	
23 Costs of Sale (8%)	<u>\$27,440.00</u>
24 Equity in the Property:	\$<74,909.24>

25 As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since this
26 is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is entitled to
27 relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).
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III.
**MOVANT IS ENTITLED TO RELIEF FROM THE
AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).**

CAUSE - LACK OF ADEQUATE PROTECTION

Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to adequate protection of its interest in the Property.

Movant submits that adequate protection in this case requires normal and periodic cash payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed to Movant, including all attorneys' fees and costs incurred in the filing of this motion.

Movant is informed and believes that Debtor is presently unwilling or unable to provide adequate protection to the Movant and there is no probability that adequate protection can be afforded to Movant within a reasonable time.

By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C. § 362(d)(1), based upon the failure of Debtor to provide adequate protection to Movant.

WHEREFORE, Movant respectfully prays for an Order of this court as follows:

1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the enforcement by Movant of all of its rights in the Real Property under the Note and the Deed of Trust;

2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

3. Granting Movant leave to foreclose on the Real Property and to enforce the security interest under the Note and the Deed of Trust, including any action necessary to obtain possession of the Property;

4. Permitting Movant to offer and provide Debtor with information re: a potential Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss Mitigation Agreement, and to enter into such agreement with Debtor;

5. Alternatively, in the event this court declines to grant Movant the relief requested above, Movant requests that an Order for adequate protection be issued, requiring the Debtor to reinstate and maintain in a current condition all obligations due under the Note and Deed of Trust and all other deeds of trust encumbering the Real Property, including Debtor's obligations to pay when due (a) the monthly installments of principal and interest, as required under the Note;

1 (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtor in order to
2 protect Movant's interest in the Real Property, including all attorneys' fees and costs incurred in the
3 filing of this motion;

4 6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion be
5 included in the outstanding balance of the Note as allowed under applicable non-bankruptcy law;
6 and

7 7. For such other and further relief as the court deems just and proper.

8 Dated: January 4, 2011

PITE DUNCAN LLP

9 /s/ HIEU T. PHAM (CA SBN 265146)
10 HIEU T. PHAM
11 Attorneys for JPMORGAN CHASE
12 BANK, NATIONAL
13 ASSOCIATION
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